LINDA MASHUNKASHEY KAYS
v.
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-70-A Decided September 17, 1990

Appeal from a decision holding that a saltwater disposal well was not the source of contamination of groundwater under an Osage allotment.

Appeal dismissed in part; decision affirmed.

1. Indians: Mineral Resources: Oil and Gas: Generally--Water Pollution Control: Generally

In determining whether a saltwater disposal well is leaking, the Bureau of Indian Affairs may consider as probative evidence the results of an Environmental Protection Agency mechanical integrity test of the well which is conducted pursuant to that agency's Underground Injection Control program under the Safe Drinking Water Act, 41 U.S.C. § 300h (1982).

2. Board of Indian Appeals: Jurisdiction--Regulations: Generally

The Board of Indians Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

3. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or any other party.

APPEARANCES: Michael C. Snyder, Esq., Oklahoma City, Oklahoma, for appellant; Cecil O. Wood, Jr., Esq., and William E. Haney, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pawhuska, Oklahoma, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Linda Mashunkashey Kays seeks review of an April 28, 1989, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), determining that a salt water disposal (SWD) well on appellant's restricted property was not the source of contamination of groundwater under the property and holding that the easement for the well was granted in accordance with Federal law. For the reasons discussed below, the Board dismisses this appeal in part and affirms the Area Director's decision.

Background

Appellant, an Osage Indian, owns a parcel of land in Osage County, Oklahoma, in restricted fee status. The parcel is described as the NE¼ NE¼ sec. 11, and the NW¼ NW¼, sec. 12, T. 26 N., R. 7 E. The land constitutes a portion of the allotment made to appellant's grandfather, Oscar Logan, Osage Allottee No. 644, on May 20, 1909. Appellant inherited an interest in the allotment from her mother, Mary Rose Logan (Allen) (Labadie) Lynn. Following a partition of the property among her mother's heirs, appellant received a deed to her portion, approved on July 10, 1984. The deed contains a reservation of all minerals to the Osage Tribe, as did the original allotment deed. 1/

A lease for the oil and gas underlying what is now appellant's property was executed by the Principal Chief of the Osage Tribe on February 27, 1976, and approved on March 1, 1976. A well was drilled but did not produce oil or gas in paying quantities. By letter of February 15, 1979, the lessee requested permission to leave the well unplugged because of its potential for use as a SWD well. BIA authorized leaving the well unplugged until August 15, 1979. 2/ However, the well remained unplugged and unused until 1983.

On October 5, 1983, the Chief, Branch of Minerals, Osage Agency, BIA, approved an easement for use of the well as a SWD well by Calumet Oil Company, which had an oil and gas lease on property north of appellant's property. The easement was granted under 25 CFR 226.23, which provides:

> The Superintendent, with the consent of the Osage Tribal Council, may grant easements for wells off the leased premises to be used for waste or salt water disposal, water injection, water

1/ Section 3 of the Act of June 28, 1906, 34 Stat. 539, 543, reserved the mineral estate under the Osage lands to the tribe for 25 years. Following several limited extensions, the reservation was extended "in perpetuity" by section 2(a) of the Act of Oct. 21, 1978, 92 Stat. 1660.

2/ A handwritten note on the BIA copy of the February 15 letter indicates that the well should be left open until a lease sale on August 15 to see if the lease was sold and if so, whether the new lessee wanted the well. The well was to be plugged if it was not to be used.

> supply, or other necessary services. [3/] Rental payable to the Osage Tribe for such easements shall be an amount agreed to by Grantee and the Osage Tribal Council subject to the approval of the Superintendent. Grantee shall be responsible for all damages resulting from the use of such wells and settlement therefor shall be made as provided in § 226.21.

The well was converted to SWD use in August or October 1983. 4/

In 1986, appellant requested compensation for damages to her property. 5/ Following an inspection of the property by the agency appraiser, the Superintendent advised appellant that the damages would be less than $10. 6/ Appellant pursued the matter, contending that she was entitled to $500-$800 in damages. On December 5, 1986, appellant signed an agreement in which she accepted a December 2, 1986, offer made by Calumet, which proposed:

> In order to settle all damages for our use of the restricted Indian surface land * * * owned by [appellant] on which our Logan #1 SWD well is located, we are agreeable to paying the sum of $800.00. For purposes of this settlement the term "all damages" shall include all use of the surface to date and all future use of the surface reasonably necessary as a prudent operator to the continued maintenance and operation of our Logan #1 SWD well, the tanks now on the well site, lead line and roads.

In May 1988, a water well test hole was drilled on appellant's property. The Indian Health Service (IHS) tested the water and found it to contain 1000 PPM chlorides.

3/ The Area Director states that the Chief, Branch of Minerals, has been authorized to approve such easements by a general resolution of the Osage Tribal Council and Departmental delegations of authority.

4/ The Osage Agency Superintendent's Aug. 24, 1988, decision states that the conversion was made in October 1983. The Area Director's brief states it was effected in August 1983.

5/ Section 2 of the Act of Mar. 2, 1929, 45 Stat. 1478, 1479, provides:

"The bona fide owner or lessee of the surface shall be compensated, under rules and regulations prescribed by the Secretary of the Interior in connection with oil and gas mining operations, for any damage that shall accrue after the passage of this Act as a result of the use of such land for oil or gas mining purposes, or out of damages to the land or crops thereon, occasioned thereby."

25 CFR 226.20 and 226.21 set out procedures for settlement of damages claimed by surface owners.

6/ Damages in the amount of $820 had been paid in 1978 in connection with the drilling of the well. Of that amount, $645 was paid to appellant's mother and $275 to her lessee. The damages were to cover four tanks, the well site, road and water damage.

By letter of June 28, 1988, appellant asked the Superintendent to nullify the agreement she had signed in 1986. She stated that she had been under the influence of prescription drugs and eggnog on the morning of December 5, 1986, and that her judgment had been impaired. By another letter of the same date, she asked the Superintendent to seek compensation from Calumet for contamination of groundwater under her property. By a third letter of the same date, she sought nuisance damages for loud noises emanating from a well north of her property.

On July 28, 1988, the Superintendent issued a decision declining to nullify the December 5, 1986, agreement and rejecting appellant's other claims. Appellant requested a hearing under 25 CFR 226.44. 7/ A hearing was held before the Superintendent on August 15, 1988. At the hearing, appellant contended that groundwater under her property was contaminated by the well on her property during the time it remained unplugged from 1977 to 1983 and/or during or after its conversion to a SWD well. Appellant demanded that the well be shut down by August 19, 1988.

On August 24, 1988, the Superintendent issued a decision holding:

> 1. The converted oil well referred to as Codding #1, SWD and also called Logan #1 has not at any time contaminated any subsurface formation and did not contaminate the alleged fresh water well drilled by the surface owner on May 5, 1988.
>
> 2. All damages which are compensable to the surface owner as a result of the conversion of the well to a saltwater disposal well have been paid and said payment was reasonable compensation.
>
> 3. There is no basis to shut down the saltwater disposal well as the well presently meets all requirements.

(Superintendent's Aug. 24, 1988, Decision at 5).

Appellant appealed to the Area Director, disputing the Superintendent's conclusion that the well had not contaminated the groundwater under her property. She also contended that the provisions of 25 CFR 226.23 were inconsistent with the limited ownership right of the Osage Tribe, a breach of trust responsibility to the Osage surface owners, and an unconstitutional taking of the surface owners' property.

7/ 25 CFR 226.44 provides:

"Any person, firm, or corporation aggrieved by any decision or order issued by or under the authority of the Superintendent, pursuant to the regulations in this part, may file with the Superintendent within 30 days an application for modification or revocation of such decision or order. The Superintendent shall give notice of the time and place and conduct a hearing upon the application within 10 days after its receipt by him. If the applicant is not satisfied with the decision of the Superintendent, an appeal may be taken as provided in 25 CFR Part 2."

The Area Director affirmed the Superintendent's decision on April 28, 1989. He stated that the SWD well had been inspected on March 1, 1989, by the Area Environmental Protection Officer, a petroleum engineer from the Osage Agency, and a hydrologist from the Billings Area Office, BIA, who concluded that the well was not leaking and was not contaminating the aquifer at the site of the IHS test hole. He stated further:

> [Appellant] contends that the 1,000 PPM chloride count in her subsurface water supply is the result of salt water intrusion from the [SWD] well located on her property. My review of the Osage Agency records indicates that the operation of the [SWD] well is in full compliance with the rules and regulations of the Environmental Protection Agency (EPA). I base this finding upon the April 2, 1987, Mechanical Integrity Test which was made by EPA as required under 40 CFR 147.2912, reflecting that the well was in compliance with the standards of that agency. Specifically, that test reveals no significant fluid movement into the underground source of drinking water, and no significant leak in the casing, tubing or packer of the [SWD] well. The results of the test were that the [SWD] well passed the test. I further note from the record that the electric logs made at the time the well was drilled in 1977 reflect that the water contained substantial concentrations of chlorides similar to or higher than the chlorides found in the test conducted by IHS for [appellant] in 1988.
>
> I conclude that the fact that the well was not plugged and remained dormant from 1977 until 1983 had little effect on the chloride content of the underground drinking water reservoir. Further, the Mechanical Integrity Test conducted on April 2, 1987, reveals no significant leak in the casing, tubing, or packer of this well. Accordingly, I find no evidence that the salt water being injected into the [SWD] well is migrating into any fresh water zone.

(Area Director's Apr. 28, 1989, Decision at 2). The Area Director held that "the evidence establishes that the [SWD] well located on the restricted lands of [appellant] is not the source of contamination to the underground drinking water reservoir" (Area Director's Apr. 28, 1989, Decision at 3).

With respect to appellant's remaining arguments, the Area Director held that BIA actions concerning the well on appellant's property were consistent with the statutes and regulations governing Osage lands and minerals and that he lacked authority to rule on appellant's argument that 25 CFR 226.23 was an unconstitutional taking of appellant's property.

Appellant's appeal from this decision was received by the Board on June 2, 1989. Both appellant and appellee filed briefs.

Discussion and Conclusions

On appeal to the Board, appellant disputes the Area Director's conclusion that the contamination of the groundwater under appellant's property was not caused by the SWD well; she contends that the Area Director relied on inadequate evidence to support his conclusion. Further, she argues that BIA has breached its trust responsibility to her, that 25 CFR 226.23 is inconsistent with the ownership rights of the Osage Tribe vis-a-vis those of the surface owners, and that the regulation is an unconstitutional taking of surface owners' property. As relief, appellant requests:

> 1. [that the Board w]ithdraw the Osage Agency August 24, 1988 decision letter and the Muskogee Area Office, April 28, 1989 decision;
>
> 2. that the Area Office adequately determine whether the underground water located on [appellant's] property has been contaminated by the injection of saltwater or by the lack of having plugged the well after abandonment by the drilling operations;
>
> 3. that the saltwater well be shut down; [8/]
>
> 4. that damages be paid at the market rate for all past and future saltwater disposal per barrel injected into the subsurface of [appellant's] property;
>
> 5. that reasonable compensation be paid for the contamination of [appellant's] underground fresh water supply along with any fines and penalties appropriate;
>
> 6. that the Area Office recognize the Osage owners of restricted allotted lands as having the complete ownership of the subsurface which includes the underground formations used for the injection of any foreign substance, including saltwater not directly related to the production of minerals on location;
>
> 7. [that the Board t]ake such other action as necessary to fulfill the Osage Agency's trust responsibility to Appellant.

(Appellant's Opening Brief at 22).

In response to appellant's first argument, the Area Director argues that he relied on probative evidence when he concluded that the SWD well

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8/ On June 18, 1990, the Area Director notified the Board that the well has now been plugged, under procedures approved by BIA and EPA. The Area Director argues that the plugging has rendered this appeal moot. Appellant disputes this contention. Because appellant seeks relief in addition to the plugging of the well, the Board finds that this appeal should not be considered moot.

was not the source of contamination of the fresh water under appellant's property. He contends that appellant has not carried her burden of proving error in his decision.

[1] The Area Director relied on, inter alia, a mechanical integrity test conducted by the EPA on April 2, 1987, pursuant to its Underground Injection Control (UIC) program for the Osage Mineral Reserve. This test showed that (1) there was no significant fluid movement into an underground source of drinking water through channels adjacent to the well bore and (2) there was no significant leak in the casing, tubing, or packer.

The EPA's UIC program for the Osage Mineral Reserve is governed by regulations in 40 CFR Part 147, Subpart GGG, promulgated pursuant to Part C (Protection of Underground Sources of Drinking Water) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h (1982). 40 CFR 147.2912(a) requires mechanical integrity tests for wells in the category of the SWD well at issue here. 9/

In the SDWA, Congress charged the EPA with primary responsibility within the Federal government for protecting underground sources of drinking water. The EPA's authority to implement a UIC program for the Osage Mineral Reserve, including authority to require mechanical integrity tests for all existing injection wells therein, was upheld in Phillips Petroleum Co. v. United States Environmental Protection Agency, 803 F.2d 545 (10th Cir. 1986). The court in Phillips rejected, inter alia, an argument that the EPA's mechanical integrity tests should not be required for old injection wells which were in compliance with BIA standards. 803 F.2d at 560-61.

It is clear that Congress intended that EPA standards and expertise would control in matters concerning the integrity of injection wells. Therefore, the Board finds that it was entirely appropriate for the Area Director to rely on the results of the EPA's mechanical integrity test of the SWD well at issue here.

In addition to the results of the EPA test, the Area Director had before him the electric log made at the time the well was drilled in 1977. This log showed chlorides of 1600 PPM, higher than the 1988 IHS finding of 1000 PPM. The Area Director also had before him the hydrologist's report concerning the March 1, 1989, inspection of the SWD well made by the

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9/ 40 CFR 147.2912 concerns wells authorized by BIA and completed prior to Dec. 30, 1984. Subsection 147.2912(a) provides in part:

"Each well * * * must have mechanical integrity. Mechanical integrity must be demonstrated within five years of program adoption. * * * Conditions of both paragraphs (a)(1) and (a)(2) of this section must be met.

"(1) There is no significant leak in the casing, tubing or packer. * * *

"(2) There is no significant fluid movement into a[n underground source of drinking water] through vertical channels adjacent to the well bore."

hydrologist and a petroleum engineer, who concluded that the well was not leaking and was not contaminating the groundwater at the site of the IHS test hole. 10/

While appellant argues that the evidence relied on by the Area Director was inadequate, she has not produced any evidence to show that the SWD well is the source of contamination of the groundwater. Rather, her contentions to that effect are based upon speculation. The Board finds that the Area Director reasonably relied on the evidence before him to conclude that the SWD well was not the source of contamination. It further finds that appellant has not shown error in the Area Director's conclusion. As the Board has stated on a number of occasions, in appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency decision is erroneous or not supported by substantial evidence. E.g., Hays v. Muskogee Area Director, 18 IBIA 380 (1990).

[2] The remaining issues raised by appellant are issues over which this Board lacks jurisdiction. Appellant challenges the validity of 25 CFR 226.23 on grounds that it does not correctly reflect the ownership rights of surface owners and that it is an unconstitutional taking of surface owners' property. The Board has no authority to declare a duly promulgated Departmental regulation invalid. Utu Utu Gwaitu Paiute Tribe v. Sacramento Area Director, 17 IBIA 141 (1989).

[3] Appellant also seeks damages, apparently including damages for alleged breaches of trust in failing to protect the groundwater under her property. The Board is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It does not have authority to award money damages against BIA or any other party. Henderson v. Portland Area Director, 16 IBIA 169 (1988). 11/

10/ The hydrologist's report, after concluding that the SWD well was not the source of contamination, continues:

"I am concerned, however, that the high chloride content may not be a naturally occurring phenomenon and that it is due to an area-wide contamination of shallow aquifers. The contamination has probably developed during the early history (before 1950) of the production of petroleum, when the procedures and practices for disposing of brine derived from petroleum production were not environmentally sound."

He recommends that BIA, the EPA, the United States Geological Survey, and the relevant state agencies cooperate in conducting an investigation of groundwater throughout Osage County.

11/ Neither of the parties has addressed the question of whether the damage settlement procedures in 25 CFR 226.20 and 226.21 should have been followed. The Board assumes that the parties have considered this dispute to fall outside the scope of those sections, which appear to be limited to surface damages.

The parties have also not addressed the question of the extent to which appellant may be precluded from seeking damages in this matter by the agreement she signed in December 1986. Because it lacks jurisdiction to award damages, the Board does not consider this issue.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed in part for lack of jurisdiction. The Area Director's April 28, 1989, decision is affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge